

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Video Description: Implementation of the	)	MB Docket No. 11-43
Twenty-First Century Communications and	)	
Video Accessibility Act of 2010	)	

**PETITION FOR PARTIAL RECONSIDERATION OF  
NCTA – THE INTERNET & TELEVISION ASSOCIATION**

NCTA – The Internet & Television Association (“NCTA”), pursuant to Section 1.429 of the Commission’s rules, submits this Petition for Partial Reconsideration of the Order in the above-captioned proceeding.<sup>1</sup>

Video description helps to provide blind and visually-impaired audiences better access to pre-recorded programming. NCTA’s members have been leaders in providing video description on pre-recorded programs, and they remain committed to furthering the Commission’s accessibility goals. To that end, NCTA and its affected programmer members support the Commission’s recent decision to increase the required amount of video-described programming.<sup>2</sup> However, as we explain below, the unduly restrictive repeat rule and the unworkable waiver process offered by the Commission may discourage expansion of video-described program offerings. We file the instant petition to seek limited relief from the requirement to file quarterly waiver petitions where networks covered by the rules provide significantly more hours of video-

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<sup>1</sup> See *In re Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report & Order, 32 FCC Rcd 5962 (2017) (“Order”). The *Order* was subsequently published in the Federal Register. See 82 Fed. Reg. 37345 (Aug. 10, 2017).

<sup>2</sup> See Order ¶ 7 (increasing the required number of hours from 50 hours per quarter to 87.5 hours per quarter on the “included” top-four broadcast and top five non-broadcast networks).

described programming than required but nonetheless cannot comply with the new rules because many of these hours are not credited.

This inability to fully account for many hours of video-described programming arises from the Commission's strict limit on counting repeats. Filing quarterly waivers of the rule is an impractical and ineffective solution to this foreseeable problem. Instead, for the reasons described herein, the Commission should reconsider its decision and provide appropriate relief by making modest changes to the unduly restrictive repeat rule and adopting a safe harbor for covered networks that offer video description for a substantial portion of their programming.

### **DISCUSSION**

Some of the most highly-rated non-broadcast networks offer a mix of popular new and repeat pre-recorded programming, along with live or near-live programming exempt from the video description rules. These networks spend substantial sums to acquire the most popular program series and movies precisely because they have enduring appeal. Although much of this programming is video-described, the networks cannot count many of these hours toward compliance with the current or soon-to-be-increased hourly threshold, because the rules limit program networks to counting the description on a program only twice – at the first airing and a single repeat – no matter how often that program is shown with video description.<sup>3</sup> This limitation, coupled with the increase in the number of required video-described hours, will inevitably lead to compliance problems for non-broadcast networks, as NCTA has repeatedly

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<sup>3</sup> 47 C.F.R. § 79.3(c)(2). The Commission's original video description rules did not permit program networks to count any repeats. However, upon reconsideration, the Commission allowed networks to count one repeat towards reaching the 50-hour-per-quarter threshold, in recognition that "allowing a limited number of repeats" would provide covered networks "reasonable flexibility to make programming more accessible . . . without intruding unnecessarily into program production and distribution." *In re Implementation of Video Description of Video Programming*, Memorandum Opinion & Order on Reconsideration, 16 FCC Rcd 1251 ¶ 22 (2001).

demonstrated in the record.<sup>4</sup> The solutions offered in the Order fail to adequately address these concerns.

To be sure, the new rules seek to provide some flexibility by permitting the increased number of mandated hours of video description to be aired outside of prime time or in children’s programming.<sup>5</sup> The Order explains that “[t]he added flexibility provided under our new rules should alleviate this concern.”<sup>6</sup> Unfortunately, that is not the case with respect to affected non-broadcast networks that have invested in growing libraries of video-described programming with lasting audience appeal. New programs on these networks – programs that, if pre-recorded, will in all likelihood be video-described – typically first air during prime time.<sup>7</sup> Some of these networks also air exempt live sports in prime time during certain quarters. Their program schedules in other day parts consist largely of repeat airings of programming. A network may already have counted a video-described repeat toward compliance twice and will be barred by

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<sup>4</sup> See, e.g., Letter from Diane B. Burstein, NCTA, to Marlene H. Dortch, FCC, at 1 (July 6, 2017) (explaining that “it is foreseeable that programming networks would not be able to reach the requisite hour threshold with video-described programming that could not be counted toward compliance under the rules even though they may be airing hundreds of hours or more of video-described programming per quarter.”); NCTA Comments at 14 (June 27, 2016) (noting that “nearly doubling the amount of video-described requirements will almost inevitably lead to issues that need to be considered at the outset, and not as part of an ad hoc waiver process” and pointing out the numerous reasons that program networks may have difficulty complying); Letter from Stephanie L. Podey, NCTA, to Marlene H. Dortch, FCC, at 2 (Nov. 9, 2016) (noting that “even under the current rules, covered networks may have challenges in meeting their 50-hour obligation in a given calendar quarter if they do not have sufficient prime time and children’s programming”... and that “this issue would only be exacerbated with an increase in the number of hours of mandated video-described programming” and attaching chart evidencing extent of video description during prime time on two of the top 5 program networks); NCTA Comments at 17 (Apr. 28, 2011) (noting that “it is possible that in some instances a network may simply run out of programs that can be counted toward the 50 hour requirement” and urging the Commission to take action to avoid the issue “without requiring advanced governmental approval in the form of a waiver”). Unless otherwise indicated, all citations herein are to documents filed in MB Dkt. No. 11-43.

<sup>5</sup> Order ¶ 15. The additional 37.5 hours can be aired any time between 6 AM and midnight, while the 50-hour requirement can only be met by video-describing prime time or children’s programming.

<sup>6</sup> *Id.*

<sup>7</sup> The business model based on a mixture of new and repeat programming supports the production of greater amounts of original programming on a number of non-broadcast networks.

the rules from receiving credit for future airings of that program no matter how far removed from the second airing on that network or how popular that program is to the network's audience. Because program licensing agreements often span many years and permit multiple airings of the same program to allow program networks to recoup their investments, a typical non-broadcast network schedule that contains many popular repeats will quickly run out of programs that can count toward achieving compliance – even with the expanded times of day during which such programming otherwise could be counted.<sup>8</sup> Thus, the rule's additional time-of-day flexibility, by itself, does not alleviate this problem for those non-broadcast networks that generate top ratings by airing a significant number of repeats during non-prime time hours. It also does not adequately account for top-rated networks that air significant amounts of repeat children's programming throughout the day.

The Order declined to relax the restriction on counting repeats based on a belief that such relief “would ultimately reduce the overall amount of described programming available to consumers, because some networks might rerun the same described programming over and over.”<sup>9</sup> There is no reason to fear that a network will fill its schedule with a small number of endlessly repeated episodes simply to meet its video description obligation, and there is nothing in the record to support such a concern. Program networks compete vigorously for audiences by investing in and developing program schedules with broad consumer appeal. Networks that incorporate repeat showings, marathons, and “binging” opportunities for the most popular programs pursue this programming strategy because it is successful, and the ratings confirm that

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<sup>8</sup> Additionally, certain contracts governing acquired programming will permit the network to increase the number of episodes airing from older seasons when, in response to positive viewer ratings, the network acquires additional seasons.

<sup>9</sup> *Order* ¶ 16.

viewers value this approach – otherwise, these networks would not be among the top-five rated non-broadcast networks subject to the rules. In fact, watching marathons of programs and binging on multiple seasons of television program series are increasingly popular ways for modern audiences to consume programming.<sup>10</sup> In addition, children are known to appreciate watching repeat programming.<sup>11</sup> As child audiences age up and out of the target demographic, these programs are freshly viewed by the next younger age group.

A network that relies on what the audience perceives to be excessive repeats will not attract or retain viewers. Thus, by tying the video description compliance obligation to audience ratings, the Commission has already built into the rule the most effective policing mechanism to avoid excessive repetition of programs.<sup>12</sup> Under these circumstances, there is no reasoned basis for the Commission to withhold needed relief now simply to guard against what is clearly a speculative and counterproductive programming strategy.

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<sup>10</sup> See, e.g., Todd Spangler, *Binge Nation: 70% of Americans Engage in Marathon TV Viewing*, Variety, Mar. 23, 2016 (citing a Deloitte survey showing that 70% of U.S. consumers now binge-watch TV shows), available at <http://variety.com/2016/digital/news/binge-watching-us-study-deloitte-1201737245/>; Jessica Toonkel & Lisa Richwine, *U.S. TV Networks Embrace ‘Binge-Watching,’ Taking Cue from Netflix*, Reuters.com, Mar. 11, 2016 (explaining that networks are adapting to ‘new TV viewing habits and profit from the ‘binge-watching’ made popular by video streaming services like Netflix”), at <http://www.reuters.com/article/us-television-bingeviewing/u-s-tv-networks-embrace-binge-watching-taking-cue-from-netflix-idUSKCN0WD0E5>; Bill Carter, *No Mystery: Ratings Heat Up for ‘NCIS’*, N.Y. Times, Nov. 8, 2008 (noting that reruns prove to be highly rated on non-broadcast networks), available at <http://www.nytimes.com/2008/11/17/arts/television/17ncis.html?mcubz=0>; Brian Gallagher, *TBS Celebrates Star Wars Day with May 4th Movie Marathon*, MovieWeb, May 2, 2017 (noting popularity of Star Wars marathon), at <http://movieweb.com/star-wars-day-movie-marathon-may-4th-tbs/>; Matthew Dessem, *TBS Targets Binge-Watchers With Marathon Schedule for New Comedy Search Party*, Slate.com, July 31, 2016, at [http://www.slate.com/blogs/browbeat/2016/07/31/tbs\\_will\\_air\\_search\\_party\\_s\\_entire\\_season\\_the\\_week\\_of\\_thanksgiving.html](http://www.slate.com/blogs/browbeat/2016/07/31/tbs_will_air_search_party_s_entire_season_the_week_of_thanksgiving.html); Laura Bradley, *Binge-Watch Your Childhood as the Disney Channel Marathons All of Its Original Movies*, Vanity Fair, Apr. 20, 2016, available at <https://www.vanityfair.com/hollywood/2016/04/disney-channel-marathons-all-of-its-original-movies>; Philiana Ng, *USA Preps Fan-Driven ‘Suits’ Marathon*, HollywoodReporter.com, Apr. 24, 2014, at <http://www.hollywoodreporter.com/live-feed/suits-usa-preps-fan-driven-698621>.

<sup>11</sup> See, e.g., *In re Children’s Television Obligations of Digital Broadcasters*, Report & Order, 19 FCC Rcd 22943 ¶ 23 (2004) (recognizing that children can benefit from repeat viewing of the same programming); *id.* at Statement of Commissioner Kathleen Q. Abernathy (stating “[s]tudies show young children learn better through repetitive messages”).

<sup>12</sup> See 47 C.F.R. § 79.3(b).

The Order, although recognizing that added day-part flexibility might not be enough,<sup>13</sup> falls short in providing alternative avenues for relief. Instead, it notes that “[t]o the extent that any individual network has problems satisfying the new hour requirement even with this flexibility, it may file a waiver request with the Media Bureau”<sup>14</sup> and that “waiver requests may be filed if our requirements are infeasible or prove to be unduly burdensome under particular circumstances.”<sup>15</sup> An *ad hoc* waiver proceeding is not an appropriate solution here.

The government should not be in the position of scrutinizing and second-guessing the quarter-by-quarter programming decisions of networks or interfering with programmers’ editorial judgments. Yet the waiver approach sets up a process destined to produce this precise result. The Commission’s answer to this previously-raised concern is to suggest that waivers are unlikely to be filed in the future since waivers were not filed in the past.<sup>16</sup> Nothing in the record suggests that past practice is an accurate predictor of future compliance difficulties here. As noted, this problem will only be exacerbated as the hourly threshold is increased and as program networks re-air programming that contains video description that already has been counted twice in the current or previous quarters, making waiver requests not only a possibility but an inevitability if the limited relief requested herein is not granted.

In any event, the Order provides no comfort on this score. In fact, it contains no guidance about when or how a program network could obtain a waiver and raises more questions than it

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<sup>13</sup> See Order ¶ 17

<sup>14</sup> *Id.* ¶ 15, n.61.

<sup>15</sup> *Id.* ¶ 17.

<sup>16</sup> See *id.*

answers.<sup>17</sup> Would a program network need to file for a waiver in advance of airing its quarterly programming? If so, how far in advance must the network file to ensure it could make alternative programming arrangements in the event the waiver is denied? What if a network makes changes to its program schedule during the quarter, which can occur for a variety of reasons? Would it need to subject its quarterly program schedules and programming choices to second-guessing by the government? Could the government order it to change its schedule? How much notice would the network be given of grant or rejection of the waiver request? Just asking these questions demonstrates why a waiver approach raises grave concerns about the government inappropriately affecting the mix of programming that a network chooses in its editorial judgment to offer. Could a waiver be sought after the quarter's programming already has aired? Such an after-the-fact review raises further questions about how a network could ever come into compliance, especially if it confronts the same issue with repeat programming quarter after quarter.

Furthermore, a waiver proceeding imposes unnecessary costs on the agency and stakeholders. It injects uncertainty and delay into programming decisions.<sup>18</sup> It makes program

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<sup>17</sup> The "favorable" factors for waiver requests, *both* of which must be met, appear unduly restrictive as well. For example, the first factor requires that "[a]ll pre-recorded programming between 6 A.M. and midnight in the relevant calendar quarter is being described, even if not all of it can be counted toward the rules." *Id.* ¶ 18 (emphasis added). There may well be circumstances, however, in which particular programs, even if pre-recorded, are not video-described. This may occur when a program is recorded too close to the air date to accommodate the script-writing and voice-over work required to add video description to the audio track. It may also occur where a network chooses to include a different audio track containing Spanish or other language in the secondary audio program. The Order also creates a much more lenient waiver standard for broadcast networks because the Commission recognizes that broadcast networks do not program an affiliate's full day. Thus, on the broadcast side, this factor may be satisfied by demonstrating that "all non-'live or near-live' programs *provided in hours programmed by the broadcast network* are described." *See id.* ¶ 18, n.71 (emphasis added). The same flexibility is not afforded to non-broadcast networks even though their programming strategies may mirror to some degree those of broadcasts networks by airing new, original programs in prime time and offering acquired programming that pre-dates the Commission's reinstatement of the video description rules (*e.g.*, older movie titles) in other day parts.

<sup>18</sup> Indeed, the Commission can take years to process waiver requests. *See Motion Picture Association of America; Petition for Expedited Special Relief; Petition for Waiver of the Commission's Prohibition on the Use of*

networks subject to the rules far less nimble in competing against other networks and programmers. A waiver process, with its multiple pleadings and potentials for stalling out, seems particularly ill-suited to the fast-paced, dynamic and highly competitive video programming landscape on both traditional and online platforms.

For all these reasons, NCTA respectfully urges the Commission to reconsider its approach. Specifically, we recommend adoption of the following adjustments to the rule, which will eliminate the problems with the current rule described above while not diminishing the amount of video-described programming made available to viewers and in fact encouraging networks to provide even greater amounts of such programming:

- permit a program network to count repeats four times in addition to its original airing;
- to provide further assurance that more new programming containing video description will be aired during times with large audiences, retain the current approach that permits two showings during prime time or children’s programming, and afford covered networks the additional flexibility to count three more repeats in other day parts between 6 A.M. and midnight;
- allow the cycle for counting repeats to start over after a period of years, given the lasting appeal of many of these programs, the lengthy contract terms governing their exhibition, and children “aging up” into the audience demographic for certain repeat programming;
- adopt a safe harbor so that a network that is unable to provide 87.5 hours of “countable” video-described programming in a particular calendar quarter would still

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*Selectable Output Control*, Memorandum Opinion & Order, 25 FCC Rcd 4700 (Med. Bur. 2010) (concluding a proceeding that took the Commission two years to complete, granting a waiver of the encoding rules for MVPDs to offer early-release theatrical content).



be considered in compliance if it otherwise provides a substantial amount of video-described programming; and

- permit compliance to be averaged across multiple quarters to account for seasonal variations in the offering of live sports programming and other scheduling variables.

### **CONCLUSION**

The cable industry remains committed to serving its blind and visually-impaired customers, including by delivering substantial and increasing amounts of video-described programming. Providing the limited relief requested herein will allow program networks to deliver even more video description in the years to come without fear of becoming embroiled in unnecessary, highly burdensome, and ineffective waiver proceedings.

Respectfully submitted,

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